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No. 97-930

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary of State,
Petitioner,
vs.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Respondents' briefs show that this case essentially boils down to the following basic question: Are the States barred from imposing any meaningful regulation of the initiative process under the First Amendment?

All of the Respondents and their amici argue that *Meyer v. Grant, 486 U.S. 414 (1988)*, controls and that the States' regulations are, therefore in their view, subject to "exacting scrutiny." To them, the States' legislatures are acting out of "hostility" to the initiative process; claims of fraud and misuse of the process by state legislative bodies are mere

pretexts which merely mask the real underlying attempts by the legislatures to wrest power away from the citizens.

The State of Colorado in no way doubts the sincerity of the beliefs held by the Respondents and their amici. However, the State strongly and respectfully disagrees with the truth of their beliefs. From the State of Colorado's perspective, there is hard evidence of fraud in the initiative process that it has in fact encountered in the wake of Meyer, and there is every indication that without some reasonable regulation of the process, fraud and abuse could increase. The State of Colorado submits that the record in this case shows that the State acted with hard evidence and in good faith in enacting the regulations at issue (registration, reporting and badges). Indeed, the people of Colorado voted for the registration requirement, a point conveniently side-stepped by the other side in this case.

The State of Colorado does not dispute that there is a strong speech component to circulating petitions. That this Court settled in *Meyer*. But what the Respondents will not accept, and what the State of Colorado finds controlling, is the fact that petition circulators are also an integral part of the process by which Colorado law is added to or amended -- a process usually resulting in changes to Colorado's Constitution. As part of that process, circulators assume obligations and responsibilities to all of the people in Colorado, not just themselves or those who support the viewpoint they are advancing. Opponents of their measures and the people of Colorado have an equally strong interest in insuring that the process by which proposed changes to Colorado's Constitution are made are fair and free of abuse.

The protection of the integrity of the initiative process is more than just a shibboleth to sustain the exercise of state police power. With greater frequency, political and economic factions are turning to the initiative process to

advance their causes. Many proposed initiatives, even on relatively simple matters, are proposed as constitutional changes so as to place the subject matter beyond the reach of Colorado's General Assembly,[1] and many are highly controversial. It is not surprising that the normal political process in Colorado has generated the political energy necessary to impose regulations on the initiative process. One of the most profound regulations of the initiative process -- Colorado's adoption of the requirement that an initiative contain only one subject[2] -- was recently adopted by a vote of the people in 1994.[3]

The course urged by Respondents and their amici is a dangerous one for the States that enjoy lawmaking by initiative. Respondents request a First Amendment power so broad and complete in scope that it can foreclose essentially all state regulation of the process except that which establishes some number of required signatures and verifies their authenticity. While the First Amendment undoubtedly protects some of our country's most cherished rights, its use

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[1] One initiative that has been recently certified for the ballot proposes a constitutional amendment designed to prevent the General Assembly from enacting any law that would single out hog farms for environmental regulation.

[2] Colo. Const. art. V, § 5.5; Colo. Rev. Stat. § 1-40-106.5.

[3] The single-subject requirement was challenged on constitutional grounds and recently upheld in *Campbell v. Buckley, No. 98-K-1022, Findings of Fact and Conclusions of Law (D. Colo. August 4, 1998)*. According to Judge Kane: "Unlike in [*Meyer v.] Grant*, the single-subject requirement neither targets the circulation process nor limits, in any way other than by limiting access to that process, the exchange of ideas that take place during circulation." Slip op. at 8.

to ban completely legislative regulation of the initiative process is no less severe than the prohibition laws this Court struck down in *Meyer*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). While state legislative bodies cannot unnecessarily trammel on the First Amendment rights of petition circulators, the federal Constitution should not be used to interfere completely with the States' ability to determine for themselves how best to regulate a lawmaking process that is uniquely a creature of state, not federal, law.[4]

The flexible standard for assessing ballot-access regulations is the appropriate one to apply in this case. Under it, Colorado's regulations which are at issue here easily pass muster. However, if the Court applies Meyer's "exacting scrutiny" standard in assessing these regulations, the State will show later in this brief how its state interests are indeed compelling, and that the means chosen to advance them are narrowly tailored.

ARGUMENT

I. THE FLEXIBLE STANDARD IS THE APPROPRIATE ONE TO APPLY IN THIS CASE.

Not surprisingly, the Respondents and their amici go to great lengths to argue that Meyer's "exacting scrutiny" standard should apply to all three regulations at issue here.

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[4] As noted in the State's opening brief, the Framers of the United States Constitution emphatically rejected the initiative process for making law. Petitioner's Brief at 23.

Respondents' case is simple: "'exacting scrutiny' applies, and, therefore, we win." Respondents' tack is understandable, particularly because the flexible standard embodied in cases such as *Storer v. Brown*, 415 U.S. 724 (1974), *Burdick v. Takushi*, 504 U.S. 428 (1976), and *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), requires Respondents to make a showing as to the degree to which their First Amendment rights are in fact being impaired by the challenged regulations. Because, as discussed in the State's opening brief and additionally below, the actual burden on Respondents' First Amendment rights imposed by the three challenged regulations is minimal, Respondents understandably reject a test which they cannot satisfy.

The cases relied upon by Respondents and their amici involved broad prohibitions on an entire class of speech. Meyer involved a complete prohibition of paid circulators. *McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)*, involved a complete ban on anonymous leafletting. *Bellotti* involved a ban on businesses speaking out on initiatives except under very narrow circumstances. And *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), involved a ban on individuals and businesses joining together "in the exercise of the[ir] right of association" to pool their resources to express their viewpoints on ballot measures. *Id.* at 296.

This Court has observed that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 117 S. Ct. at 1370. This case involves "permissible election-related regulation" because no speech is prohibited in this case. The only limitation on speech involves Colorado's registration requirement -- someone must register

to vote before circulating petitions.[5] However, it is exceptionally easy to register to vote. Moreover, to the extent people simply want to speak to potential signers for or against an initiative during the petition circulation process, nothing in the State's regulations prohibit them from doing so. The regulations pertain only to those persons who choose to collect signatures to qualify an initiative for the ballot.

To the extent there is a speech component to the actual collection of signatures, that is precisely what brings this case under this Court's case law that assesses First Amendment impacts in the ballot-access context. Undoubtedly, the States have a strong interest in determining whether there is a significant modicum of support before initiatives are actually placed on the ballot. *See Jennes v. Fortson*, 403 U.S. 431, 442 (1971). All three regulations at issue here either directly protect the integrity of the signature collection process and/or are designed to open that process to public view. As such, they are directly tied to the requirement that proponents of measures gather an adequate number of valid signatures -- which Respondents concede is constitutional -- in contrast to the prohibitions at issue in *Meyer*, *Bellotti*, *McIntyre* and *City of Berkeley*.

It cannot be seriously argued that the adequate-number-of-signatures requirement must be assessed under the flexible ballot-access standard. No numbers requirement could satisfy strict scrutiny because a smaller number is always going to impose a lesser burden on First Amendment rights. And it is the numbers requirement that is the most significant hurdle for initiative proponents to overcome to have their

[5] The badge requirement also has some connection to speech, because it is worn at the time a circulator is soliciting signatures.

measure placed on the ballot. The registration, badge and reporting requirements protect the signature-gathering process and pale by comparison in their burden on Respondents' First Amendment rights.

The lower courts assessed the requirement that petition circulators file an affidavit with their collected signatures (*see* Petitioner's Brief at 13-15; Pet. App. at A-26 - 27) under the flexible standard and upheld it. Yet, having to swear under oath has the potential to be far more burdensome to First Amendment rights than registering to vote.

The only legal test that provides this Court the flexibility to assess the speech and non-speech/procedural aspects of the initiative process is the flexible ballot-access standard. Under it, challengers are at least required to establish initially that the regulation they are challenging impairs their First Amendment rights. The more burdensome a state regulation is on those rights, the stronger the interest a State must put forward to sustain it. *Timmons*, 117 S. Ct. at 1370, *Burdick*, 504 U.S. at 434, *Storer*, 415 U.S. at 730. Assessing initiative regulations under this test provides adequate protection for the First Amendment rights of initiative participants while affording the States some flexibility to regulate a process that is integral to the States' lawmaking function.[6]

[6] The United States District Court for the District of Colorado recently rejected a constitutional challenge to Colorado's initiative process under this Court's flexible, ballot-access standard. *Campbell v. Buckley*, No. 98-K-1022, Findings of Fact and Conclusions of Law (D. Colo. August 4, 1998). Rejecting the plaintiffs' attempt to rely upon the "exacting scrutiny" standard in *Meyer*, the Court said: "Plaintiffs attempt to distinguish [the Tenth Circuit's decision in this case below] by denying theirs is a "ballot

The flexible standard can even accommodate those situations where facially neutral, usually constitutional, regulation of the election process does in fact infringe upon First Amendment rights. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Those cases, as later interpreted by *Buckley v. Valeo*, 424 U.S. 1 (1976), still require persons challenging the election law to come forward with "record evidence of the sort proffered in NAACP v. Alabama." *Buckley*, 424 U.S. at 71.[7] That is all the State of Colorado asks in this case -- that before Colorado's facially neutral regulations addressing the initiative process can be struck down by the federal courts, the challengers of those regulations must come forward with evidence showing a significant burden on their First Amendment rights. That is the essence of the flexible, election-law standard -- a standard the Court can and should apply in assessing the regulations at issue in this case.

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access" case or that the election law cases upon which it is based apply. The denial is unavailing. The single-subject requirement is a precondition to be met before a proposed initiative will qualify for circulation, and ultimately, the ballot." Slip op. at 8.

[7] The disclosure at issue in *NAACP v. Alabama* involved the member list of the NAACP. According to the Court, the NAACP in that case "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462.

II. APPLYING THE FLEXIBLE STANDARD, THE PLAINTIFFS HAVE FAILED TO SHOW ANY "SEVERE" IMPACT ON THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Save for a couple of footnotes in the ACLU's brief, no one even attempted to show how Colorado's regulations were unconstitutional under the flexible standard of review. The reason for this omission is because the record in this case cannot support a finding that the regulations at issue constitute "severe" burdens on their First Amendment rights.

The State of Colorado in its opening brief provided the Court with a careful overview of what the record does and does not show in this case.[8] By contrast, a close examination of the record Respondents did discuss shows very little analysis concerning impacts on Respondents' First Amendment rights.[9] The State urges this Court to review

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[8] Petitioner's Brief at 4-6, 32-34, 35-40, 43-44.

[9] Almost all of the briefs of Respondents and their amici are devoted to attempting to persuade this Court that strict scrutiny should apply. To the extent to which there is any discussion of the record, most of this discussion is devoted to attacking the State's justification for the regulations. The Brief of Respondents David Aitken, Jon Baraga, and Bill Orr, as the Parent and Guardian of William David Orr, devotes no space to discussing any injury to Respondents' First Amendment rights. Pro Se Respondent Bill Orr's Brief contains a very short discussion of the badge requirement at 12-13. It contains additional references to the record at 21-23 that are irrelevant to the regulations at issue in this case. The Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawkins, Lonnie Haynes, and Alden Kautz, at 17-23, discusses the only evidence in the record that addresses the burden, if any, the regulations at issue place on

carefully the record below. Nowhere is there the type of "record evidence of the sort proffered in NAACP v. Alabama." *Buckley*, 424 U.S. at 71. *See supra* note 7.

Respondents have shown, at most, some minor inconvenience in complying with Colorado's regulations. The only possible exceptions to this observation relate to the testimony of Paul Grant, Bill Orr and Jack Hawkins and Jon Baraga. Paul Grant testified that he would not wear a badge because "I don't think it's right." Pro Se Respondent Bill Orr's Brief at 13. Bill Orr testified that he would not register to vote based upon his political beliefs. Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawking, Lonnie Haynes, and Alden Kautz ("ACLF Brief") at 17. Jack Hawkins and Jon Baraga indicated that they had potential circulators who simply refused to register, *id.* at 18,and that they knew of circulators who did not want to wear badges. *Id.* at 22-23. The State respects the fact that Messrs. Grant, Orr, Hawkins and Baraga do not agree with the registration and badge requirements, but their beliefs should not be sufficient to invalidate those requirements for all petition circulators in all instances. Nor should the State of Colorado's regulations be invalidated simply because a few people do not wish to comply with them. This is not "specific evidence of past or present harassment" nor that which would demonstrate a "chill" of their First Amendment rights. *Buckley*, 424 U.S. at 74.

Respondent's First Amendment rights. The State of Colorado respectfully suggests to this Court that this record is woefully inadequate to show any significant impact on Respondent's First Amendment rights, let alone a "severe" burden required by the applicable law.

Unless the State of Colorado's regulations pose a "severe" burden on the Respondents' First Amendment rights, *Timmons*, 117 S. Ct. at 1370, Colorado's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Colorado's registration, badge and reporting requirements are nothing more than that, reasonable and nondiscriminatory. Under the appropriate test, Colorado's regulations are clearly constitutional.

III. EVEN UNDER MEYER'S "EXACTING SCRUTINY," COLORADO'S REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

Respondents and their amici argue for an initiative process that takes place in a black box. They argue that the State has no interest in preserving the integrity of the petition circulation and signature-gathering process. Rather, the State, in their view, can only check to see if the signatures actually collected are valid. The manner in which the signatures are collected, they argue, should be free of regulation because the State is powerless to interfere with their right to petition their government for redress.[10]

Respondents also attempt to minimize the significance of the role played by petition circulators. Bill Orr and various amici, for example, argue that it is the Secretary of

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[10] The Petition Clause of the First Amendment addresses the people's right to communicate with their elected representatives, not the right to make law by initiative which is at issue here. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985).

State who verifies the signatures, not the circulators themselves.[11]

The facts and the law do not support Respondents' rhetoric. A petition circulator serves a vital function in insuring that only valid signatures are collected. First, the Secretary of State only verifies a very small percentage of the actual number of signatures based upon a sampling formula. Colo. Rev. Stat. § 1-40-116(4). Her primary methods are to look for facially invalid signatures and to compare names with those on voter registration rolls. Second, only the petition circulator is in a position to observe the behavior of the petition signers. The circulator can see if a single signer attempts to sign several different names. The circulator can observe whether signers appear to be entering their own names and addresses, or simply, for example, copying names from a phone book or some list. Perhaps most importantly, it is the circulator who is charged with insuring that nothing of value is given someone for their signature.

Furthermore, there are a host of ways valid signatures could be collected illegally. For example, under Colorado law, it is a crime to make false or misleading statements relating to a petition or to pay someone to sign a petition.[12]

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[11] *See* Petitioner's Brief at 13-15 (discussing affidavit requirement).

[12] These regulatory prohibitions were cited in *Meyer*, 486 U.S. at 427, as examples of valid state regulation of the initiative process.

Respondents attempt to belittle the fraud that the State of Colorado proved below and the amici States demonstrated in their brief. For example, Bill Orr asked rhetorically, "assuming arguendo a petition is certified to the ballot, which did not contain

All of the People of Colorado have an interest in ensuring the initiative process is fair and free of abuse. Opponents of measures, the press, and interested citizens generally have a right to see that the laws regulating the process are followed. While the number of persons who actually commit fraud may be relatively small,[13] the effect of such fraud on the public's confidence in the process is great.

The State of Colorado has, therefore, a strong interest in enforcing those limitations on circulator abuse recognized in *Meyer*. *See supra* note 12. As shown below, the regulations at issue in this case are narrowly tailored to do no more than give the State the tools necessary to prevent those abuses.

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all the requisite signatures, what harm befalls the state, if the sovereign electorate accept or reject a 'fair and accurately' presented petition at the polls." Pro Se Respondent Bill Orr's Brief at 44. In other words, so long as the people get to vote on the measure at the polls, any irregularities in the process before that point are effectively cured by the People's vote. With all due respect to Mr. Orr, the checks and balances of a valid process do matter, and it would seriously undermine the integrity of the process to allow irregularities in the collection of signatures to go unchecked.

[13] In the 1990 to 1992 time frame, the Secretary of State referred some 15 to 20 cases of potential fraud involving initiatives to the Attorney General for investigation and prosecution. In 1992, the Attorney General issued nine warrants. Petitioner's Brief at 5.

A. The Registration Requirement.

The State proved at trial below that in 1992, three of nine warrants for circulator fraud could not be served because the subjects of the warrants were not Colorado citizens who were registered to vote. Petitioner's Brief at 5, 32-33. Respondents and their amici both belittle this fact and argue that the State has no business having the power to enforce its laws regulating circulators. However, if the only way the State of Colorado can ensure compliance with its circulator laws is to require petition circulators to be Colorado residents who have proved that fact by registering to vote, then Colorado's registration requirement is narrowly tailored to address a compelling state interest.

Amicus ACLU trivializes this point by asserting that this Court's affirmance of Colorado's registration requirement will lead to all types of attempts to limit the activities of non-residents in Colorado. The ability to make law in Colorado is not just any activity. One initiative changing Colorado's Constitution can have profound impacts for the State for years to come. The lawmaking process is the essence of self-government. Why shouldn't those who play a formal role in this process have to be residents and voters?

The People of Colorado in 1980 voted to require petition circulators to be registered electors. The People reserved the right to observe the process and ensure that persons who participate in it have a sufficient nexus to the State. Even the Tenth Circuit recognized the importance of the residency requirement, Pet. App. A-30, and registration is the only way the State can insure that someone is a resident.

No evidence was presented below that non-residents were being deprived of their First Amendment rights, nor did the Respondents' show that the registration requirement

significantly burdened their ability to gather signatures. Given the ease of registration, *see* Petitioner's Brief at 30-31, this Court should reverse the Tenth Circuit and hold that the registration requirement is constitutional.

B. The Disclosure Requirements: Reports and Badges.

Both amicus briefs supporting the State of Colorado[14] showed the degree to which the States and the press have expressed concern over some facets of the initiative process. One thing is clear. While there are still initiatives that represent true, volunteer, citizen effort, there are increasingly more initiatives that are the product of large monied interests. When money is a major influence in the process, the people and their representatives demand more accountability.

While this reply brief was being written, the largest newspaper in Colorado, the Denver Post, ran a front-page story on the upcoming initiatives for the November 1998 election. Bruce Finley & Peggy Lowe, *Colorado takes the initiative, Voters could face 10 issues on ballot*, Denver Post, August 4, 1998, at 1A. Among other things, the article talked about the increased spending on initiatives:

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[14] The two amicus briefs are: Brief of the States of Washington, Alaska, Arizona, California, Idaho, Iowa, Kansas, Maine, Mississippi, Oklahoma, Ohio, Oregon, and South Dakota as Amici Curiae in Support of Petitioner, and the Motion for Leave to File Brief and Brief of the Council of State Governments, International City/County Management Association, National Association of Counties, National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association as *Amicia Curiae* in Support of Petitioner.

> Campaign spending on initiatives has increased steadily during the past two decades, topping $10 million in 1994.
>
> Initiative spending now surpasses spending on even the governor's race. An amendment that voters passed two years ago capped spending by candidates in statewide elections. But the sky's the limit for initiatives.

Id. at 1A.[15]

As discussed in the States' amicus brief, this Court in *Buckley* outlined three interests in disclosing election-related finances that could be of sufficient weight to satisfy the "exacting scrutiny" standard in that case: (1) to inform voters, 424 U.S. at 66-67; (2) to deter corruption, *id.* at 67 ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"); and (3) to detect violations, *id.* at 67-68 ("recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations"). *See* Brief of the States of Washington, etc., as Amici Curiae in Support of Petitioner at 12-13.

The reporting and badge requirements address all three justifications. A report certainly "provides the electorate

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[15] An editorial cartoon appearing in the August 6, 1998, Denver Post, at 8B, depicted: "The Initiative Process aka . . . Eliminating the Middleman." It shows a dump truck full of money on which is inscribed the words "Special Interests." It has backed through and destroyed the State Capitol inscribed with "State Legisl." The truck is dumping money into a box captioned "Ballots."

with information 'as to where political campaign money comes from and how it is spent . . . ,'" *Buckley*, 424 U.S. at 66-67, and a badge informs the person whose signature is being sought the name of the person who is soliciting it.[16]

Reports and badges both deter corruption and especially the appearance of corruption: Reports show the people exactly who is financing an initiative and who they are paying to get it on the ballot. Badges deter actual corruption in the field, such as, for example, paying people to sign a petition or misleading potential signers about the subject matter of the initiative.

And reports and badges will certainly aid in the detection of violations. Reports could provide information that would indicate that an unusual amount of money is being paid per signature, possibly indicating some payment for them. Absent a complaint from a witness, a report showing which circulators are being paid what amounts of money may be critical in uncovering monetary abuse of the process. Badges are of course essential to determine who in the field is committing a violation. *See* Petitioner's Brief at 4-5 (discussing testimony at trial showing that there was nothing that could be done concerning a number of complaints because the offending circulator could not be identified).

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[16] It is worth noting that according to the State of Washington: "Despite Washington's requirement to disclose the identities of petition circulators on a monthly basis, political committees supporting initiatives which have the money to hire petition circulators have been very successful in obtaining sufficient signatures to secure a place on the state ballot." Brief of the States of Washington, etc., As Amici Curiae in Support of Petitioner at 18 n.26 (citing statistics as proof).

This Court's own rules recognize the importance of disclosing financial influence on the amicus process. *See* Rule 37.6 (amicus "shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief").

As this Court noted in Buckley: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" 424 U.S. at 67 (quoting Louis Brandeis, Other People's Money 62 (1933)). Money has become a significant part of the initiative process today, and the State of Colorado should have the right to assure the people of this State that the signature-gathering process is free of fraud and abuse, and that any influence money has on the process is adequately disclosed to them.

CONCLUSION

This Court should reverse the Tenth Circuit and hold that Colorado's registration, reporting and badge requirements are constitutional.

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